No. 80-366

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GREAT LAKES INTERNATIONAL, INC.,
Petitioner,

—against—

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION; SAMUEL B. NEMIROW, ACTING ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS AND DEPUTY ASSISTANT SECRETARY FOR MARITIME AFFAIRS; ROBERT J. PATTON, JR., SECRETARY OF THE MARITIME ADMINISTRATION; NATIONAL DREDGING, INC.; UNITED STATES CORPORATION COMPANY; JACKMAN & COMPANY; DAVID H. JACKMAN; STUYVESANT DREDGING, INC.; ROYAL BOS KALIS WESTMINSTER GROUP N.V.; WILLIAMS-MCWILLIAMS CO., INC.; UNITED STATES TRUST COMPANY OF NEW YORK AND WARBURG PARIBAS BECKER INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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No. 80-366

Great Lakes International, Inc.,

Petitioner,

—against—

Philip M. Klutznick, Secretary of Commerce of the United States of America; United States Department of Commerce, Maritime Administration; Samuel B. Nemirow, Acting Assistant Secretary of Commerce for Maritime Affairs and Deputy Assistant Secretary for Maritime Affairs; Robert J. Patton, Jr., Secretary of the Maritime Administration; National Dredging, Inc.; United States Corporation Company; Jackman & Company; David H. Jackman; Stuyvesant Dredging, Inc.; Royal Bos Kalis Westminster Group N.V.; Williams-McWilliams Co., Inc.; United States Trust Company of New York and Warburg Paribas Becker Incorporated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Preliminary Statement

This brief is respectfully submitted on behalf of petitioner, Great Lakes International, Inc., in reply to the briefs in opposition filed on behalf of private respondents

and the government. The private respondents raise issues other than the zone of interests, concerning injury in fact (Br. Opp. 9, 15, 19-23), the subject of a cross-petition, No. 80-549, which petitioner opposes for the reasons set forth in its brief in opposition thereto.

Argument

1. This case squarely presents the issue of the proper means of applying the zone of interests criterion. It is an important federal question, on which this Court has never spoken, and an issue as to which the courts of appeal are in conflict. This case is an appropriate one for consideration of this issue since it was the only issue reached by the courts below. The case is an important one for the dredging industry, and petitioner respectfully submits that it has a strong probability of success on the merits.

2. Respondents claim that the conditional letter of approval, setting forth the final determinations challenged herein, is immune from judicial review and "incontestable" by virtue of 46 U.S.C. § 1273(e). (Private respondents' Br. Opp. 11, 23-25; gov't Br. Opp. 8).* The issue was not decided by either court below. However, petitioner maintains that the legislative history of the provision,** the agency

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* The government raises this issue for the first time in this Court. Below, it was not certain whether its letter came within the purview of the statute, it failed to move for summary judgment on this ground, and it urged that the court not decide the issue. (R.30, Federal defendants' memorandum of law, at 10).

** *See To Facilitate Private Financing of New Ship Construction: Hearings on H.R. 8637 before the House Comm. on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. 19-22, 28-29 (1954); S. Rep. No. 92-1137, 92d Cong., 1st Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3851, 3858; H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 6 (1971). Review is proper until bonds are purchased.

construction of conditional letters of approval,* and the language of the "Commitment to Guarantee," ** execution of which is sought to be enjoined, all demonstrate that the letter in issue here is not a commitment to which the statute speaks.

3. Respondents suggest that petitioner challenges the validity of the zone of interests test. (Private respondents' Br. Opp. 18; gov't Br. Opp. 7-8 n.6). This is not the case. Petitioner's objection is only to the court of appeals' unprecedented manner of applying the test, and the district court's conclusion that petitioner lacks standing for reasons that are in direct conflict with this Court's holding in *Central Vt. Transportation Co.* v. *Durning,* 294 U.S. 33, 36-39 (1935). Petitioner submits that it is clear from the last clause of 46 U.S.C. § 861 that Congress intended Title XI to protect the interests asserted in this action. It is respectfully submitted that the failure of the courts below to recognize petitioner's standing resulted from this Court's silence on the standards for the proper application of the zone of interests criterion.

4. The confusion of the courts below in applying the zone of interests criterion is apparent from the fact that they identified three different interests intended to be protected by the statutes involved. The district court held, without apparent reference to legislative history, that the

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* *See* R.33, App. 4 to Plaintiff's Memorandum in Further Support of Its Motion for a Preliminary Injunction and in Opposition to Defendants' Motions for Summary Judgment, taken from the record on appeal in *United States ex rel. Greenberg* v. *Burmah Oil Co. Ltd.*, 558 F.2d 43 (2d Cir.), *cert. denied*, 434 U.S. 967 (1977). Such a letter does not set forth a "*final* and binding commitment."

** That document states ". . . the validity of this Guarantee Commitment shall be incontestable *from the date hereof.*" (R.17, Ex. 2, Brown affidavit) (emphasis supplied).

objectives of Title XI were to build a strong American merchant marine for purposes of national defense and to provide jobs for American seamen and shipyards. (Pet. 6a). The court of appeals found that the purpose of Title XI was to encourage the use of "private capital in the financing of ship construction." (Pet. 3a). The court of appeals reached this conclusion solely on the basis of a House Report to a 1953 amendment to Title XI, an approach for which no party has found any precedent. Petitioner respectfully submits that, unlike the court of appeals below, the court of appeals for the District of Columbia circuit would not have looked at any legislative history in deciding the zone of interests question. *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 141-43 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Moreover, the court of appeals for the third circuit has seriously questioned the utility of the zone of interests inquiry. *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 582-83 n.28 (3d Cir. 1979).

5. Respondents state a general proposition that the competitive interests of competitors of parties benefited by governmental assistance programs are not within the zone of interests sought to be protected by such programs. They suggest that the disposition in the courts below, and *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977), are representative of that view. (Private respondents' Br. Opp. 10; gov't Br. Opp. 7).* Such a proposition conflicts with the

* Respondents also cite *Rural Electrification Administration, Inc.* v. *Central La. Electric Co.*, 354 F.2d 859 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966) and *Berry* v. *Housing and Home Finance Agency*, 340 F.2d 939 (2d Cir. 1965), which were decided under the "legal interest" test overruled in *Ass'n of Data Processing Service Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). The issue of competitor standing under environmental laws in *Clin-*

zone of interests holdings in *Rental Housing Ass'n of Greater Lynn, Inc.* v. *Hills*, 548 F.2d 388, 390 (1st Cir. 1977) (plaintiff landlords had standing under Community Redevelopment Act to challenge the award of H.U.D. financial assistance for housing in competition with them); *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 701 (5th Cir. 1973) (plaintiff small business had standing under Small Business Act to challenge minority set asides benefiting competitor), and *Armco Steel Corp.* v. *Stans*, 303 F.Supp. 262, 268 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779, 784 (2d Cir. 1970) (plaintiff steel manufacturer had standing to challenge approval of use of Foreign Trade Zone for vessel construction with competitor's steel in violation of Foreign Trade Zone Act and tariff acts). Respondents' position merely highlights the conflict between the decisions below and these decisions of the First, Second and Fifth Circuits.

6. Respondents' attempted distinction of *Central Vt. Transportation Co.* v. *Durning, supra*, on the ground that it preceded the passage of the Merchant Marine Acts of 1936 and 1938, does not remove the obvious conflict between the holding of that case and that of the district court below. This Court held that the citizenship requirement in

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ton Community Hospital Corp. v. *S. Md. Medical Center*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975), represents another "zone of interests" conflict among the circuits. *See, e.g., Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977); *Mobil Oil Corp.* v. *FTC*, 562 F.2d 170, 173 (2d Cir. 1977); *Robinson* v. *Knebel*, 550 F.2d 422, 424 (8th Cir. 1977); *Nat'l Helium Corp.* v. *Morton*, 455 F.2d 650, 655 (10th Cir. 1971). *Jus tertii* standing, the basis of the decision in *Hood River County* v. *United States Dep't of Labor*, 532 F.2d 1236 (9th Cir. 1976), is not in issue in this case. *Window Systems, Inc.* v. *Manchester Memorial Hospital*, 424 F.Supp. 331 (D.Conn. 1976) is irrelevant since the question there decided was whether or not a private cause of action may be inferred from a statute.

§ 38 of the Jones Act, 46 U.S.C. § 802, was intended by Congress to give effect to one of the nation's oldest policies, restated in 46 U.S.C. § 861, the protection of its domestic fleet from foreign competition.* 294 U.S. at 36-39. Respondents fail to suggest any reason why the purpose of 46 U.S.C. § 802 should have changed after it was incorporated by reference into the 1936 Act and Title XI, 46 U.S.C. §§ 1244(c), 1271(b), 1273(a) and 1274(a)(1), so as to serve only the interest of national defense, as the district court held. (Pet. 6a). Respondents' claim that the *Central Vt.* holding is limited to 46 U.S.C. § 883 ignores the fact that this Court's construction of that statute was based on the policy reflected in 46 U.S.C. §§ 802 and 861. The last clause of § 861 makes that policy the primary end to be attained in the administration of Title XI, and the other shipping laws under the jurisdiction of the Secretary of Commerce. From the statute itself, it is clear that petitioner's interest is arguably to be protected by the Secretary's administration of all the shipping laws, including Title XI. Respondents' attempt to divorce the protective purpose of the Jones Act from Title XI would render § 861 meaningless. Their claim that the Jones Act is irrelevant to Title XI (gov't Br. Opp. 6; private respondents' Br. Opp. 11-14), is thus without merit.

7. There is no lack of support in the legislative history of Title XI for petitioner's position that among the interests advanced therein is protection of American shipowners in the domestic coastwise trade from foreign competition,

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* *See also American Maritime Ass'n* v. *Blumenthal*, 458 F.Supp. 849, 856 (D.D.C. 1977), *aff'd*, 590 F.2d 1156 (D.C.Cir. 1978), *cert. denied*, 441 U.S. 943 (1979) (In § 861, Congress protected American shipowners from foreign competition); *Marine Carriers Corp.* v. *Fowler*, 429 F.2d 702, 708 (2d Cir. 1970) (the policy of § 861 is ". . . unabashedly protectionist. . . .")

for its was intended primarily to benefit those shipowners.* Indeed, the impetus for H.R. 8080, which became Title XI, was that prior to 1938 the only advantage afforded to shipowners in domestic trade was the Jones Act ban on foreign competition, and that additional assistance was needed. *See* Hearings, *supra*, at 54 and 60. Congress was well aware when it passed Title XI in 1938, that it was thereby supplementing the body of maritime law directed to protecting American shipowners from foreign competition in the domestic trade. *See* H.R. Rep. No. 2168, *supra*, at 8 (quoting Chairman Kennedy). The last clause of 46 U.S.C. § 861 specifically directs that the administration of the program be in accordance with that protective intent. The fact that Title XI was later amended to facilitate financing under the program, as set forth in the legislative history relied upon by the court of appeals (Pet. 3a), simply does not, and could not, detract from that intent.**

8. Petitioner does not contend that the government vessel financing assistance programs, including Title XI, are intended as charity toward domestic shipowners, and does not dispute Congress' ultimate purpose, to build up a strong and economically sound Merchant Fleet for purposes of

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* *See Federal Mortgage Insurance to Aid in Ship Construction and Reconditioning: Hearings on H.R. 8080 before the House Comm. on Merchant Marine and Fisheries*, 75th Cong., 1st Sess. 8, 15 and 33 (1937) (hereinafter "Hearings"); H.R. Rep. No. 1950, 75th Cong., 3d Sess. at 30 (1938); H.R. Rep. No. 2168, 75th Cong., 3d Sess. 29-30 (1938).

** Private respondents' argument (Br. Opp. 8 n.8), that still other and later amendments corroborate the court of appeals' conclusion, is not only irrelevant, but is also inaccurate. The 1954 amendments, Pub. L. No. 83-781, 68 Stat. 1267, 83d Cong., 2d Sess. (1954), which changed Title XI from a mortgage guarantee to a loan guarantee program, were not part of the 1953 Act, the legislative history of which formed the basis of the court of appeals' decision. (Pet. 15).

national defense, to create employment and to facilitate commerce. Petitioner merely maintains that the United States has always recognized that, in order to achieve those ultimate goals, it is necessary to protect domestic shipping from foreign competition. Petitioner contends that in the last clause of 46 U.S.C. § 861, Congress directed the Secretary of Commerce to implement this policy in his administration of the Title XI program. The analysis employed below, which rendered that provision meaningless, cannot be said to have adequately described the intention of Congress. It is respectfully submitted that this Court should end its silence on the issue, to provide the lower courts with the proper standard for their application of the zone of interests criterion.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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